Migration in the Mediterranean: Exposing the Limits of Vulnerability at the European Court of Human Rights

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Abstract: In recent years, the European Court of Human Rights (ECtHR) has been increasingly called upon to settle disputes pertaining to migration in the Mediterranean. This article examines the developments in the ECtHR's pertinent case law through the lens of vulnerability, a concept that offers much potential for developing the Convention in response to new challenges such as those posed by the so-called 'migration crisis'. By drawing upon literature from law, legal theory and (bio)ethics, this article will show that while the ECtHR is amenable to the recognition of vulnerability in its inherent, situational and pathogenic forms, the Court's actual application of the concept both belies this sophistication and squanders its potential. Indeed, despite widespread condemnation of the traditional, categorical conceptualisation of vulnerability, the ECtHR continues to rely on this simplistic and arguably invidious approach. As such, while the ECtHR may have extended vulnerability's reach within its case law, it has nevertheless failed to recognise and effectively respond to the lived vulnerability of all who undertake hazardous journeys across the Mediterranean Sea, irrespective of the reason or reasons for their migration.

Keywords: Vulnerability; migration; Mediterranean; European Court of Human Rights (ECtHR); asylum; *Khlaifia*.

1. Introduction

Vulnerability is a ubiquitous yet highly contested concept. It has been characterised within the literature as both universal and categorical; as enduring yet situational; as variable, occurrent, dispositional, pathogenic, layered, and more. In recent years, the European Court of Human Rights (ECtHR or Court) has drawn upon the complex concept of vulnerability with greater frequency.[1] Simultaneous to this, the ECtHR has also been called upon to adjudicate on

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an increasing number of disputes set within the Mediterranean migration context. It was with the Grand Chamber's landmark judgment in *M.S.S. v Belgium and Greece*[2] that the two collided. In *M.S.S.*, the Court for the first time accepted that asylum-seekers are, by virtue of 'the vulnerability inherent in [their] situation',[3] 'particularly vulnerable',[4] and therefore deserving of 'special protection' under the ECHR.[5] Yet, while *M.S.S.* may have further extended vulnerability's reach into the arena of cross-border migration, the Grand Chamber's late-2016 judgment in *Khlaifia and Others v Italy*[6] brought this extension to an abrupt halt. In *Khlaifia*, the Grand Chamber declined to recognise as vulnerable all those undertaking hazardous journeys across the Mediterranean, irrespective of the reasons for their migration, this being despite the Chamber having taken such a position in its judgment in the case fifteen months prior.[7] For the Grand Chamber, the journey, taken alone, was simply insufficient to establish particular vulnerability under the ECHR.

While regrettable, this outcome does not come as much of a surprise. As this article will show, it is the natural, if flawed, result of the Grand Chamber continuing to latch onto a simplistic, outdated, and arguably prejudicial, understanding of vulnerability, one which views individual vulnerability as contingent upon membership of an accepted vulnerable sub-population group. The consequence of the Grand Chamber refusing to fully embrace and apply a dynamic, more situational conceptualisation of vulnerability is two-fold. While this approach has reaffirmed the particular vulnerability of asylum-seekers, it has done so at the expense of the recognition of the lived vulnerability that is nonetheless experienced by those migrants who, having crossed the Mediterranean by precarious means, do not then go on to claim asylum in Europe. This leaves non-asylum-seeking migrants particularly exposed, as it maintains their position at the very fringes of international human rights law,[8] this being despite weighty

[1] Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2014) 111, 111.
[2] *M.S.S. v Belgium and Greece* [GC] App no 30696/09 (ECtHR, 21 January 2011).
[3] ibid para 233.
[4] ibid para 232.
[5] ibid para 251.
[6] *Khlaifia and Others v Italy* [GC] App no 16483/12 (ECtHR, 15 December 2016).
[7] *Khlaifia and Others v Italy* App no 16483/12 (ECtHR, 1 September 2015) para 135.
[8] Sylvie Da Lomba, 'Vulnerability, Irregular Migrants' Health-Related Rights and the European Court of Human Rights' (2014) 21(4) European Journal of Health Law 339, 342.

humanitarian grounds for recognising the situational vulnerability that they nonetheless experience on account of the journey.[9]

This article will begin by first surveying the literature on vulnerability (section 2), drawing in particular upon the apparent 'paradox' of vulnerability as both categorical and universal,[10] as well as examining analytical approaches that seek to more closely identify, understand and classify types and sources of vulnerability. Second, attention will turn to the ECtHR's understanding and use of the vulnerability concept both in general and in the context of the ongoing so-called 'migration crisis' (section 3). In this respect, the discussion will draw in particular on the emergence in *M.S.S.* of a two-pronged test of vulnerability tailored to the migration context (section 3.2). This nascent test will be considered in the light of insights drawn from the literature, before third, exploring its application by the Court in the *Khlaifia* judgments (section 3.3). This will involve examining and contrasting the differing conceptualisations of vulnerability advanced by the Chamber and the Grand Chamber, and by so doing, will elucidate, appraise and problematise the ECtHR's approach(es) to and application of migrant vulnerability. The discussion will then conclude (section 4) with reflections upon the repercussions for the human rights protection of both asylum-seeking and non-asylum-seeking migrants, and thoughts on what this means for the ECtHR's capacity to respond effectively to the 'new challenge[s]'[11] posed by increased migratory flows arriving at the borders of Europe by sea.

The work of Beduschi, Da Lomba, Flegar, Peroni and Timmer will be drawn upon throughout, as each has successfully linked the concept of vulnerability with human rights practice by means of exploring the jurisprudence of the ECtHR. However, insights will also be drawn from farther afield, specifically from (bio)ethics, as scholars in this and connected disciplines have been grappling with these very issues for some time, and as will be shown, such insights can prove particularly fruitful for the study of vulnerability and the law.[12]

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[9] Amnesty International, *Hotspot Italy: How EU's Flagship Approach leads to Violations of Refugee and Migrant Rights* (Amnesty International 2016) 32.

[10] Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11(4) International Journal of Constitutional Law 1056, 1058.

[11] *Khlaifia* [GC] (n 6) para 241.

[12] Indeed, Kenneth Kipnis, a leading vulnerability and ethics scholar, has expressly stated that work such as his, which is strictly concerned with the vulnerability of research subjects and not with what he terms 'everyday vulnerabilities', 'surely has an importance extending beyond the boundaries of research ethics'. See Kenneth Kipnis, 'Seven Vulnerabilities in the Pediatric Research Subject' (2003) 24(2) Theoretical Medicine and Bioethics; and Kenneth Kipnis, 'Vulnerability in Research Subjects: A Bioethical Taxonomy', in National

2. Approaching vulnerability as a concept

References to vulnerability litter popular discourse, law, policy and scholarship on a broad range of subject matters. Yet, as a concept, it enjoys little in the way of consensus, instead being characterised by ambiguity and multiplicity.[13] While much of the scholarly literature either explicitly or impliedly speaks of vulnerability as a universal characteristic of the human condition, within legal and policy frameworks vulnerability is often employed as a label,[14] most commonly attributed to an individual pursuant to their 'membership' of a distinct sub-population group that is categorised as 'vulnerable'.[15] As Nickel defines, a vulnerable population is 'a group of persons who, in virtue of some feature they share… are deserving of special protections'.[16] Such features may include, *inter alia*, a susceptibility to exploitation or harm, an inability to protect or safeguard one's own interests, unequal opportunity, or a lack of basic rights.[17] This traditional, categorical approach can be seen, for instance, in the 2013 European Union (EU) Reception Conditions Directive,[18] article 21 of which provides a non-exhaustive list of categories of persons who are considered vulnerable. These include, *inter alia*, (unaccompanied) minors, persons with disabilities, pregnant women, victims of human trafficking, and persons who have been subjected to serious forms of violence.[19] A similar reliance on the listing of vulnerable groups has been characterised by Bracken-Roche and others as 'rampant' within research ethics policies and guidelines, especially those in the health sciences.[20] A case in point are the 2002 Council for International Organizations of Medical Sciences (CIOMS) International Ethical Guidelines for Biomedical Research Involving Human

Bioethics Advisory Commission, *Ethical and Policy Issues in Research Involving Human Participants* (National Bioethics Advisory Commission, 2001).

[13] Sana Loue and Bebe Loff, 'Is there a Universal Understanding of Vulnerability? Experiences with Russian and Romanian Trainees in Research Ethics' (2013) 8(5) Journal of Empirical on Human Research Ethics 17, 17.

[14] Florenica Luna, 'Elucidating the Concept of Vulnerability: Layers not Labels' (2009) 2(1) International Journal of Feminist Approaches to Bioethics 121, 123.

[15] Florencia Luna and Sheryl Vanderpoel, 'Not the Usual Suspects: Addressing Layers of Vulnerability' (2013) 27(6) Bioethics 325, 326.

[16] Philip Nickel, 'Vulnerable Populations in Research' (2006) 27(3) Theoretical Medicine and Bioethics 245, 245.

[17] Angela Martin, Nicolas Tavaglione and Samia Hurst, 'Resolving the Conflict: Clarifying 'Vulnerability' in Health Care Ethics' (2014) 24(1) Kennedy Institute of Ethics Journal 51, 52.

[18] Directive 2013/33/EU of 26 June 2013 laying down the standards for the reception of applicants for international protection (recast) [2013] OJ L180/96 (Reception Conditions Directive).

[19] ibid article 21.

[20] Dearbhail Bracken-Roche, Emily Bell, Mary Ellen Macdonald and Eric Racine, 'The Concept of 'Vulnerability' in Research Ethics' (2017) 15(8) Health Research Policy and Systems 8, 15.

Subjects.[21] The 2002 CIOMS Guidelines refer frequently to vulnerable groups or 'classes'.[22] Particular attention is given to what Luna has termed 'a list of usual suspects',[23] which includes children,[24] persons with mental or behavioural disorders,[25] prisoners, homeless persons and refugees.[26] As expressed in Nickel's definition, designation as 'vulnerable' is important in a research setting because it affords such groups special protections and services not commonly available to the general population.[27] Indeed, in the words of Ruof, 'vulnerability is an abstract concept that has concrete effects both for those labelled vulnerable and for those not'.[28] The same is true in law. Recognition as a vulnerable person for the purpose of the EU Reception Conditions Directive is critical for anyone seeking to rely on its provisions because '[o]nly vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with [the] Directive'.[29]

For a very many scholars, categorical attributions of vulnerability are fundamentally flawed. Critics denounce the categorical approach for its exclusivity,[30] its rigidity,[31] its superficiality[32] and its ambiguity,[33] and for its reliance on a conceptual understanding of vulnerability that is both simplistic[34] and vague.[35] Levine and others put forward a particularly powerful critique of the flaws of the categorical vulnerability approach, and, more broadly, of the utility of the term 'vulnerable' itself.[36] They raise three basic problems. First, the traditional understanding of vulnerability as categorical is too broad, as 'so many categories of people are

[21] CIOMS, *International Ethical Guidelines for Biomedical Research Involving Human Subjects* (3rd edn, CIOMS 2002). The Guidelines are prepared by CIOMS in collaboration with the World Health Organization (WHO).
[22] ibid 64-66. Guideline 13: Research involving vulnerable persons (commentary).
[23] Florencia Luna and Sheryl Vanderpoel, 'Not the Usual Suspects: Addressing Layers of Vulnerability' (2013) 27(6) Bioethics 325, 325.
[24] CIOMS (n 21) 66-69. Guideline 14: Research involving children (commentary).
[25] ibid 70-72. Guideline 15: Research involving individuals who by reason of mental or behavioural disorders are not capable of giving adequately informed consent (commentary).
[26] ibid 64-66. Guideline 13: Research involving vulnerable persons (commentary).
[27] Mary Ruof, 'Vulnerability, Vulnerable Populations, and Policy' (2004) 14(4) Kennedy Institute of Ethics Journal 411, 411.
[28] ibid 412.
[29] Reception Conditions Directive (n 18) article 22(3).
[30] Da Lomba (n 8) 344.
[31] Luna and Vanderpoel (n 23) 326.
[32] Bracken-Roche and others (n 20) 15-16.
[33] Kipnis (n 12) G1.
[34] Luna and Vanderpoel (n 23) 326.
[35] Debra DeBruin, 'Looking Beyond the Limitations of "Vulnerability": Reforming Safeguards in Research' (2004) 4(3) The American Journal of Bioethics 76, 76.
[36] Carol Levine, Ruth Faden, Christine Grady, Dale Hammerschmidt, Lisa Eckenwiler and Jeremy Sugarman, 'The Limitations of "Vulnerability" as a Protection for Human Research Participants' (2004) 4(3) The American Journal of Bioethics 44.

now considered vulnerable that virtually all potential human subjects are included'.[37] Second, it is simultaneously too narrow, as exclusively emphasising group characteristics diverts attention away from contextual features.[38] Third, it stereotypes, thereby essentialising entire groups through its failure to take into consideration pertinent differences that do exist between individuals within a particular group.[39] As Aultman and others warn, to assign individuals to a particular group in this way can itself lead to exploitation and harm,[40] as those who are labelled as vulnerable risk being stigmatised[41] and becoming subject to 'paternalistic protections' that are 'premised on the assumption that the vulnerable are incapable of protecting themselves'.[42] Moreover, the failure of the categorical approach to see the individual not only stereotypes and essentialises within recognised vulnerable groups,[43] but also has the effect of obscuring and denying protection for those who experience harm on account of other, unrecognised, vulnerabilities, such as poverty.[44] This therefore calls into question the reliability of the categorical approach in identifying vulnerability and in protecting vulnerable individuals from harm.[45]

Yet, perhaps the most incising criticism comes from legal theory. The criticism advanced is that vulnerability cannot be viewed as categorical for it is universal. In contrast to the categorical approach of seeing pockets of vulnerability amongst an otherwise invulnerable general human population, for Fineman and for many others, vulnerability is 'a universal, inevitable, enduring aspect of the human condition'.[46] To be human is to be vulnerable, and to be vulnerable is to be in 'a state of constant possibility of harm'.[47] Vulnerability cannot therefore be seen as something associated with only certain population groups;[48] indeed, the very idea of human invulnerability is exposed as a fallacy.[49] Yet, Fineman's thesis, while

[37] ibid 46.
[38] ibid.
[39] ibid 47.
[40] Julie Aultman, 'Vulnerability: Its Meaning and Value in the Context of Contemporary Bioethics' (2014) 14(12) The American Journal of Bioethics 15, 16.
[41] Florencia Luna, 'Vulnerability, an Interesting Concept for Public Health: The Case of Older Persons' (2014) 7(2) Public Health Ethics 180, 182.
[42] DeBruin (n 35) 77.
[43] Da Lomba (n 8) 343.
[44] Aultman (n 40) 16.
[45] Levine and others (n 36) 44.
[46] Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20(1) Yale Journal of Law & Feminism 1, 8.
[47] ibid 11.
[48] Timmer (n 1) 112.
[49] Martha Albertson Fineman and Anna Grear, 'Introduction: Vulnerability as Heuristic – An Invitation to Future Exploration', in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2014) 11.

emphasising universality, also recognises vulnerability's particularity.[50] Specifically, an individual's experience of vulnerability is unique for it is influenced simultaneously by both one's distinctive position 'within a web of economic and institutional relationships' and one's access to and possession of resources.[51] Still, the universal approach itself is not immune to criticism. While the categorical approach has been branded as exclusive, the universal approach has been criticised for being over-inclusive. In the most stinging critique, Levine and others assert that '[i]f everyone is vulnerable then the concept becomes too nebulous to be meaningful'.[52] For Luna, the universal 'existential approach' is as dangerous as the categorical 'essentialist approach' because both risk 'naturalising' vulnerability, in other words, 'if everyone is equally and essentially vulnerable, no one is *specifically* vulnerable'.[53] The universal approach has therefore been denounced for neither 'acknowledg[ing] the special perils faced by some'[54] nor providing an adequate explanation for why special protection is in practice not afforded to all.[55] In this connection, Hurst argues simply that '[a] definition that includes humanity itself… cannot provide reason for *special* protection'.[56]

While it has been argued that there is 'no inherent impediment' to reconciling the categorical and universal approaches at a conceptual level,[57] at the practical level, this has proven far less straightforward.[58] Within the (bio)ethics literature, scholars including Luna, and Rogers, Mackenzie and Dodds, have turned to analytical approaches in an effort to bring greater nuance to the theory of vulnerability,[59] and to thereby operationalise it as a 'conceptual tool'.[60] Such analyses seek to focus more precisely on identifying characteristics that can render individuals vulnerable, in other words, its sources,[61] and assessing their impact.[62] Such characteristics, or 'vulnerability markers',[63] include not only personal characteristics of the

[50] Fineman (n 46) 10.
[51] ibid.
[52] Levine and others (n 36) 46.
[53] Luna (n 41) 182 (emphasis in original).
[54] DeBruin (n 35) 76.
[55] Martin and others (n 17) 52.
[56] Samia Hurst, 'Vulnerability in Research and Health Care; Describing the Elephant in the Room?' (2008) 22(4) Bioethics 191, 192 (emphasis in original).
[57] Peroni and Timmer (n 10) 1060; Da Lomba (n 8) 349.
[58] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Introduction' (2012) 5(2) International Journal of Feminist Approaches to Bioethics 1, 2.
[59] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) International Journal of Feminist Approaches to Bioethics 11, 26.
[60] Luna (n 14) 123.
[61] Margaret Meek Lange, Wendy Rogers and Susan Dodds, 'Vulnerability in Research Ethics: A Way Forward' (2013) 27(6) Bioethics 333, 335.
[62] Rogers and others (n 59) 16; DeBruin (n 35) 77.
[63] Meek Lange and others (n 61) 334.

individual, but also the nature of one's social, legal, political and economic environment,[64] which, when taken together, help emphasise both vulnerability's relationality[65] and mutability.[66]

Of particular utility in the context of migration at sea is the vulnerability taxonomy proposed by Rogers, Mackenzie and Dodds.[67] Their approach seeks to identify and classify sources of vulnerability and associated duties that exist towards those recognised as vulnerable.[68] The taxonomy is formed of three overlapping kinds of vulnerability. These are inherent, situational, and pathogenic vulnerability,[69] all of which, as will be shown, are present in a migration at sea setting. The first, inherent vulnerability, echoes Fineman's thesis. It is concerned with vulnerabilities that 'arise from our corporeality, our neediness, our dependence on others, and our affective and social natures', in other words, vulnerabilities inherent in the human condition.[70] The second, situational sources, are context-specific. They are 'caused or exacerbated by the personal, social, political, economic, or environmental situation of a person or social group'.[71] Such sources may exist either in the short or long term, and may occur either once or on multiple, separate occasions.[72] The third, pathogenic sources, emanate from 'dysfunctional social or personal relationships',[73] in other words, from relationships characterised by, *inter alia*, prejudice, abuse, persecution or injustice.[74] Pathogenic vulnerabilities may also occur when well-intended protection policies either exacerbate existing vulnerabilities[75] or generate new vulnerabilities.[76] Rogers, Mackenzie and Dodds then take their taxonomy one stage further by arguing that these three sources of vulnerability can be experienced in one of two states – either dispositionally or occurrently.[77] To take being at sea as an example.[78] All human beings are dispositionally vulnerable at sea, yet most of us will

[64] Franck Duvell, Anna Triandafyllidou and Bastian Vollmer, 'Ethical Issues in Irregular Migration Research in Europe' (2010) 16(1) Population, Space and Place 227, 232.
[65] Luna (n 14) 129; Meek Lange and others (n 61) 335.
[66] DeBruin (n 35) 77.
[67] Rogers and others (n 59) 24.
[68] Meek Lange and others (n 61) 336 and 340.
[69] Rogers and others (n 59) 24.
[70] ibid.
[71] ibid.
[72] ibid.
[73] Meek Lange and others (n 61) 336.
[74] ibid.
[75] Rogers and others (n 59) 25.
[76] Meek Lange and others (n 61) 336.
[77] Margaret Meek Lange, 'Vulnerability as a Concept for Health Systems Research' (2014) 14(2) Ethical Review of Health Services Research 41, 42.
[78] Rogers and others (n 59) give the example of hunger. On page 24, they explain that while all '[a]ll human beings are dispositionally vulnerable to hunger… most of those of us who live in affluent countries are not occurrently

never find ourselves in a situation in which we are occurrently vulnerable at sea. Even when at sea, the vast majority of us will benefit from the safety provided by being on an appropriate seagoing craft. This is in stark contrast to those who find themselves in ill-equipped, overcrowded crafts that are unsuited to making long journeys across large expanses of water.

In sum, analytical approaches to vulnerability are useful as they not only assist in better integrating the universal and context-specific interpretations of vulnerability,[79] but also provide a way to better direct attention towards what Rogers, Mackenzie and Dodds have called 'more than ordinary vulnerability'.[80] However, it must be borne in mind that although taxonomies may help to provide more 'concrete' guidance, such guidance can only ever be seen as 'general'.[81] While the taxonomy can be utilised as a framework through which to view vulnerability in its many manifestations, the theory does not, and cannot, provide all of the answers, especially when it comes to determining where the threshold lies between 'ordinary' and 'more than ordinary' vulnerability. The decision as to where this threshold lies, and therefore the decision as to who should be owed 'special protection' on account of their vulnerability, rests with the decision-makers. Turning therefore to now look specifically at the ECtHR, the vulnerability taxonomy of Rogers, Mackenzie and Dodds will be used to examine the manner in which the concept of vulnerability has been employed by the Court as a tool to determine who should be owed 'special protection' under the ECHR, first, in general, and second, in respect to migration specifically.

3. Examining migrant vulnerability at the ECtHR

3.1. Unpacking the ECtHR's general approach to vulnerability

While the term 'vulnerable' has been a feature of the ECtHR's lexicon for decades,[82] the Court has been engaging far more frequently with the concept in recent years.[83] Signalling

vulnerable to life-threatening hunger on a daily basis, unlike a significant proportion of the world's population who lack the resources to supply their daily nutritional needs'.

[79] Rogers and others (n 58) 3-4.

[80] Rogers and others (n 59) 24.

[81] Meek Lange and others (n 61) 337.

[82] See multiple references to vulnerability in *Dudgeon v UK* App no 7525/76 (ECtHR, 22 October 1981).

[83] Veronika Flegar, 'Vulnerability and the Principle of *Non-Refoulement* in the European Court of Human Rights' (2016) 8(2) Contemporary Readings in Law and Social Justice 148, 153.

perhaps an at least implicit appreciation of the universality of human vulnerability,[84] the Court has often used a range of preceding qualifying terms directly prior to the term 'vulnerable'. These have included 'specially',[85] 'highly',[86] 'extremely'[87] and 'particularly',[88] with the latter being especially common.[89] It nevertheless remains somewhat unclear as to when and why an applicant will be deemed 'particularly vulnerable' in the eyes of the Court,[90] this being in no small part due to the Court having provided neither a precise definition nor a coherent set of vulnerability 'criteria'.[91] Scholarly analyses have though given some insight into how the concept is understood by the Court.

Analysing Timmer's thematisation of the Court's use of the term vulnerable[92] through the lens of the vulnerability taxonomy of Rogers, Mackenzie and Dodds reveals that the Court recognises inherent vulnerabilities, in particular, of children and persons with mental disabilities, as well as situational sources of vulnerability, for instance, being in detention or in a domestic violence setting.[93] Moreover, Timmer identifies in the Court's jurisprudence what she calls 'compounded vulnerability'.[94] On such occasions, the Court recognises an applicant as being vulnerable on multiple grounds, or to use the language of Luna, presenting with multiple layers, which may be both inherent and situational. For example, in *V.C. v Italy*,[95] in finding that the applicant was in a situation of 'particular vulnerability',[96] the Court considered both the applicant's inherent vulnerability as a 15-year-old minor[97] and 'the particular situation of vulnerability, both moral and physical' in which she found herself.[98] Timmer further observes that in some such cases 'compounded vulnerability' may result in a seemingly more

[84] On this point, Peroni and Timmer report that a Strasbourg judge confirmed as much, stating that 'All applicants are vulnerable, but some are more vulnerable than others'. See Peroni and Timmer (n 10) 1060.
[85] *Dudgeon* (n 82) para 62.
[86] *Centre for Legal Resources on behalf of Valentin Câmpeanu v Romania* [GC] App no 47848/08 (ECtHR, 17 July 2014) para 104.
[87] *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006) para 55.
[88] *Yordanova and Others v Bulgaria* App no 25446/06 (ECtHR, 24 April 2012) para 130.
[89] It is, however, important to note that, while in the vast majority of cases the Court has used a preceding qualifying term such as 'particular', its use of such terms is not entirely consistent. For example, in *Kiyutin* (n 112), while the Court unequivocally asserts in paragraph 74 that the applicant, as a person with HIV, 'belonged to a particularly vulnerable group', earlier, in paragraph 64, the Court simply refers to persons living with HIV as 'a vulnerable group'.
[90] Flegar (n 83) 157.
[91] Da Lomba (n 8) 343.
[92] Timmer (n 1) 112.
[93] ibid 114-118.
[94] ibid 118.
[95] App no 54227/14 (ECtHR, 1 February 2018).
[96] ibid para 110.
[97] ibid para 89.
[98] ibid para 110.

pronounced vulnerability, which has been termed by the Court as 'extreme', 'double' or 'great'.[99] This was notably the case in the Court's judgment in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*.[100] In *Mubilanzila Mayeka*, the Court found that a five-year-old, unaccompanied, irregular migrant was 'in an extremely vulnerable situation',[101] and that there had been a consequent violation of Article 3 on account of her detention for two months in an adult detention facility.[102]

However, although in judgments such as *V.C.* the Court has approached the question of vulnerability in the light of the specific circumstances of the applicant, Timmer, both individually and in her work with Peroni, has emphasised the Court's particular reliance upon 'vulnerable groups',[103] or in other words, the categorical approach, in its vulnerability reasoning. This is especially the case in judgments concerning minority rights and discrimination. In its landmark judgment in *Chapman v UK*,[104] the Court, despite finding no violations of any of the Convention articles raised,[105] explicitly accepted 'the vulnerable position of Gypsies as a minority'.[106] Since *Chapman*, the ECtHR has recognised the vulnerability of other sub-population groups, including, as already mentioned, children[107] and persons with mental disabilities,[108] as well as, in *Kiyutin v Russia*,[109] persons living with HIV.[110] In *Kiyutin*, the ECtHR gave some indication as to the rationale behind its vulnerable groups approach, explaining that 'such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion'.[111] Similarly, in *Alajos Kiss v Hungary*,[112] the Court stated that 'particularly vulnerable group[s] in society… have suffered considerable discrimination in the past'.[113] While these statements are of course insightful, they cannot be taken as ultimately determinative of which groups will or will not be considered vulnerable by the ECtHR because not all groups whose vulnerability has been recognised by

[99] Timmer (n 1) 118.
[100] *Mubilanzila Mayeka* (n 87).
[101] ibid paras 55 and 103.
[102] ibid paras 50 and 59.
[103] Timmer (n 1) 111; Peroni and Timmer (n 10) 1056.
[104] [GC] App no 27238/95 (ECtHR, 18 January 2001).
[105] ibid paras 116, 120, 125 and 130.
[106] ibid para 96.
[107] *Okkali v Turkey* App no 52067/99 (ECtHR, 17 October 2006) para 70.
[108] *Renolde v France* App no 5608/05 (ECtHR, 16 October 2008) para 84.
[109] App no 2700/10 (ECtHR, 10 March 2011).
[110] ibid para 64.
[111] ibid para 63.
[112] App no 38832/06 (ECtHR, 20 May 2010).
[113] ibid para 42.

the Court fit within this particular reasoning, for instance, children. Indeed, in respect to children, Timmer pinpoints the Court's references to dependency on others and an inability to complain about abuse as both being sources of their 'inherent and constant' vulnerability.[114]

Identification by the ECtHR as vulnerable is highly important because such recognition can have substantial implications in respect to the level of protection afforded by the Convention. As Beduschi observes, although the ECtHR does not create new obligations *per se*, it does utilise vulnerability 'as a magnifying glass, exposing a greater duty to protect and care imposed upon States'.[115] For example, in *Alajos Kiss*, the Court stated that 'if a restriction on fundamental rights applies to a particularly vulnerable group in society… then the State's margin of appreciation is substantially narrower and it must have very weighty reasons for the restrictions in question'.[116] In *Chapman*, the Court found there to be a positive obligation on contracting states 'to facilitate the Gypsy way of life',[117] and in *Valiulienė v Lithuania*,[118] the Court stated that 'given the particular vulnerability of women affected by domestic violence, a heightened degree of vigilance was required by the State'.[119]

It is clear therefore that recognition as vulnerable under the Convention has important consequences for the level of protection afforded to certain applicants and for the obligations incumbent upon contracting states. It is also apparent that the Court has, in extending the vulnerability concept to a broader range of applicants, relied heavily, albeit not exclusively, on a categorical approach that attaches vulnerability to certain groups.[120] In the light of these general findings, this discussion now turns to examine precisely how the concept of vulnerability has been deployed by the ECtHR in respect to the Mediterranean migration context, chiefly with discussion of the Court's judgments in the cases of *M.S.S.* and *Khlaifia*.

3.2. *M.S.S.* – a nascent test of vulnerability in the Mediterranean migration context

[114] Timmer (n 1) 114.
[115] Ana Beduschi, 'Vulnerability on Trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts' (2018) 36(1) Boston University International Law Journal 55, 85.
[116] *Alajos Kiss* (n 112) para 42.
[117] *Chapman* (n 104) para 96.
[118] App no 33234/07 (ECtHR, 26 March 2013).
[119] ibid para 51.
[120] Timmer (n 1) 114.

It was in *M.S.S.* that the ECtHR for the first time identified asylum-seekers as 'a particularly underprivileged and vulnerable population group in need of special protection'.[121] *M.S.S.* concerned the treatment of an Afghan male national who, having first entered the EU via Greece, travelled on to Belgium, only to then be transferred back to Greece upon attempting to seek asylum in Belgium.[122] The applicant claimed, *inter alia*, that his detention at Athens International Airport and his subsequent living conditions in Greece amounted to inhuman and degrading treatment.[123] In respect to his living conditions, the applicant alleged that he had for months been residing in a 'state of extreme poverty'.[124] In its judgment, the Court attached 'considerable importance' to the fact that the applicant had sought asylum.[125] Specifically, in coming to its finding of a violation of article 3, the Grand Chamber stated that 'the applicant's distress was accentuated by *the vulnerability inherent in his situation as an asylum-seeker*'.[126]

The *M.S.S.* judgment has been well-received in many quarters.[127] As Peroni has said, 'the line of reasoning put forward by the majority… opens up the idea of vulnerability to other circumstances and other groups'.[128] Never before had the ECtHR so emphatically supported the rights of asylum-seekers in general, and '[n]ever before… had living conditions of extreme poverty been found to give rise to state responsibility under Article 3'.[129] In order to achieve these advances, the Court relied substantially upon a bespoke test of vulnerability tailored to the forced migration context. The Court identified two sources, or prongs, of the applicant's vulnerability as an asylum-seeker. The first was 'everything he had been through during his migration' (migratory experience), and the second was 'the traumatic experiences he was likely to have endured previously' (prior trauma).[130] The Court left undefined what it meant precisely by 'everything he had been through during his migration' and 'traumatic experiences', however, these are surely open to broad interpretation in the light of the blanket manner with

[121] *M.S.S.* (n 2) para 251.
[122] ibid paras 11-12 and 33.
[123] ibid paras 205-206 and 235.
[124] ibid paras 235-239.
[125] ibid para 251.
[126] ibid para 233 (emphasis added). Note that the Court here uses the term 'inherent' in respect to all that is inherent in the *status* of an asylum-seeker as opposed to all that is inherent in the human condition, per Rogers and others (n 59).
[127] For a thoughtful appraisal, see Marie-Bénédicte Dembour, *When Humans Become Migrants* (OUP 2015) 402-441.
[128] Lourdes Peroni, 'M.S.S. v. Belgium and Greece: When is a Group Vulnerable?' (*Strasbourg Observers*, 11 February 2011) <strasbourgobservers.com/2011/02/10/m-s-s-v-belgium-and-greece-when-is-a-group-vulnerable> accessed 15 May 2018.
[129] Flegar (n 83) 157.
[130] *M.S.S.* (n 2) para 232.

which the Court attributed these to all asylum-seekers. '[E]verything' that an asylum-seeker has 'been through during [their] migration' may surely encompass not only reception conditions and characteristics of the receiving state's asylum system, but also all that was experienced during the actual journey itself. For instance, the cramped and unsanitary conditions experienced on an overcrowded seagoing craft, a lack of privacy and basic supplies, the sense of precarity and uncertainty associated with a long and dangerous journey by sea, and acute exposure to the elements, especially at night.[131]

Viewing these two sources through the lens of the vulnerability taxonomy of Rogers, Mackenzie and Dodds, it becomes apparent that this is a heavily situational test. Both sources primarily stem not from the inherent nature of the applicant but from the situation in which the applicant found himself. The test is open to temporary forms of vulnerability and is flexible enough to recognise pathogenic sources as a sub-type of this situational vulnerability. Such pathogenic sources could here include the prejudice, injustice and persecution that the applicant likely experienced, as well as the exacerbation of his situational vulnerability on account of the Greek authorities' failure to act. However, while the sources of vulnerability here are strongly situational, and while the Court in *M.S.S.* did, on the whole, conduct an individualised assessment of the applicant's situation, it is nevertheless clear that the manner in which the Court applied vulnerability to the applicant was unmistakeably categorical. This was as a consequence of the Court affiliating the two-pronged test with the 'status' of the applicant as an asylum-seeker.[132] Moreover, by recognising vulnerability as 'inherent in his situation as an asylum-seeker',[133] the Court sweepingly attributed particular vulnerability to all asylum-seekers 'as though it were an inherent attribute of the entire class'.[134] This thus brings to the fore the concerns advanced in the literature in respect to essentialism, paternalism and stigmatisation, and also raises questions about the reliability of the test in recognising vulnerability, more on which will be discussed below.

[131] Such a position is espoused in UNHCR, *Vulnerability Screening Tool* (UNHCR and IDC 2016) 2. This position is though in contrast to Brandl and Czech who do more narrowly construe this statement as referring to only 'the specific problems asylum-seekers face in their struggle to make a living while awaiting the decision on their request for international protection'. See Ulrike Brandl and Philip Czech, 'General and Specific Vulnerability of Protection-Seekers in the EU: Is There an Adequate Response to their Needs?', in Francesco Ippolito and Sara Iglesias Sánchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart 2015) 250.
[132] *M.S.S.* (n 2) para 251.
[133] ibid para 233.
[134] Peroni and Timmer (n 10) 1068.

It is indeed clear that the *M.S.S.* judgment has been highly influential. It is also apparent that this nascent vulnerability test has gained significant traction. The Court has on numerous occasions since reaffirmed its position that asylum-seekers constitute a 'particularly… vulnerable population group in need of special protection', this being on account of the two grounds listed in *M.S.S.*[135] In fact, in *Mahamed Jama v Malta*,[136] the Court clarified this further by announcing that the particular vulnerability of asylum-seekers is 'a state of vulnerability which exists irrespective of other health concerns or age factors'.[137] However, the precise form and reach of the test has remained somewhat undefined. Indeed, while in many of the subsequent cases the applicants have, at the material time, been seeking asylum and awaiting a decision on their claim, this was not, however, the case in *Khlaifia*.

3.3. *Khlaifia* – vulnerability on account of the journey (alone)?

3.3.1. Conflicting judgments

In *Khlaifia*, the Court was called upon to adjudicate on the receiving and holding (to be read as 'detaining') of three Tunisian non-asylum-seeking migrants (the applicants) by Italian authorities, first, at the Early Reception and Aid Centre (CSPA) at Contrada Imbriacola on the island of Lampedusa,[138] and second, on ships moored in Palermo harbour, Sicily,[139] as well as the subsequent return (to be read as 'expulsion') of the applicants to Tunisia in accordance with 'simplified procedures' bilaterally entered into by the two states.[140] The applicants, all males aged in their twenties, had each been travelling on board rudimentary vessels across the Mediterranean when they were intercepted by the Italian coastguard.[141] After spending a few days on Lampedusa, the applicants were flown to Palermo.[142] They remained in Palermo, again for only a few days,[143] before being returned to Tunis.[144]

[135] For example, *S.H.H. v UK* App no 60367/10 (ECtHR, 29 January 2013) para 76; and *A.S. v Switzerland* App no 39350/13 (ECtHR, 30 June 2015) para 29.
[136] App no 10290/13 (ECtHR, 26 November 2015).
[137] ibid para 100.
[138] *Khlaifia* [GC] (n 6) para 12.
[139] ibid para 15.
[140] ibid paras 36-40.
[141] ibid paras 10-11.
[142] ibid paras 11-15.
[143] ibid para 17.
[144] ibid para 21.

In both of the judgments in the case, that is, in the judgment of the Chamber and in the judgment of the Grand Chamber, vulnerability performed a brief but crucial role.[145] As in *M.S.S.*, in *Khlaifia*, the question of vulnerability was raised in relation to an alleged violation of article 3,[146] here specifically, the detention conditions at the CSPA.[147] The applicants complained of overcrowding, poor sleeping arrangements, and unacceptable conditions of hygiene and sanitation.[148] For the Chamber, the evidence before it revealed standards that had fallen short of the requirements prescribed by article 3.[149] However, before either the Chamber or the Grand Chamber came to a finding as to whether or not there had been a violation of article 3, both considered the duration of the applicants' detention. It was indeed uncontested that the applicants had been held at the CSPA for a period of just two to three days.[150] Both the Chamber and the Grand Chamber accepted that the short duration of the applicants' detention meant that 'their limited contact with the outside world could not therefore have had serious consequences for their personal situations'.[151] The Grand Chamber also distinguished the case from those previous cases in which it had found violations of article 3 'in spite of the short duration of the deprivation of liberty in question',[152] doing so on the grounds that, in those cases, the conditions of detention had been particularly poor, even 'atrocious'.[153] The applicants nevertheless stressed the following:

> *…that at the material time they had just survived a dangerous crossing of the Mediterranean by night in a rubber dinghy, and that this had weakened them physically and psychologically. They had thus been in a situation of vulnerability, accentuated by the fact that their deprivation of liberty had no legal basis, and their mental distress had increased as a result.*[154]

The applicants were here drawing on both situational and pathogenic sources of vulnerability, remarking in particular on how the actions of the Italian authorities had exacerbated, rather than alleviated, their 'situation of vulnerability'. The Chamber agreed. The

[145] ibid para 194; *Khlaifia* (n 7) para 135.
[146] In total, the applicants alleged nine separate violations of four substantive rights – articles 3, 5, 13 and article 4 of protocol no. 4.
[147] *Khlaifia* [GC] (n 6) para 136.
[148] ibid paras 142-144.
[149] *Khlaifia* (n 7) para 134.
[150] *Khlaifia* [GC] (n 6) para 14.
[151] ibid para 195; *Khlaifia* (n 7) para 135.
[152] *Khlaifia* [GC] (n 6) para 196.
[153] ibid.
[154] *Khlaifia* [GC] (n 6) para 143.

applicants were vulnerable. Moreover, in the Chamber's view, there had been a violation of article 3.[155] For the Chamber, it was a 'fact that the applicants… were in a situation of vulnerability'.[156] In line with the argument put forward by the applicants, the Chamber found that this 'situation of vulnerability' was on account of their having 'just undergone a dangerous journey on the high seas'.[157] Having accepted that the applicants had been in a vulnerable situation, the Chamber then conducted what was essentially a balancing exercise between the short duration on one side and the applicants' vulnerability on the other.[158] It found that the short duration of the applicants' stay in the CSPA was outweighed by their vulnerability. As such, '[t]heir confinement in conditions which impaired their human dignity thus constituted degrading treatment in breach of Article 3'.[159] For the Grand Chamber, however, no such balancing exercise was required. The applicants were not vulnerable and there was no violation of article 3.[160] While the Grand Chamber recognised that 'the applicants were weakened physically and psychologically because they had just made a dangerous crossing of the Mediterranean',[161] it nevertheless qualified this by emphasising that the applicants had not sought asylum during the 'not insignificant period' they had been in Italy.[162] As the applicants were not asylum-seekers, they consequently 'did not have the specific vulnerability inherent in that status'.[163] The Grand Chamber thereby concluded that neither the treatment of the detainees nor the conditions of their detention at the CSPA violated article 3.[164]

3.3.2. Conflicting conceptualisations

It is clear from both *Khlaifia* judgments that the journey is relevant, per the first prong of the *M.S.S.* test (migratory experience). Both the Chamber and the Grand Chamber appreciated that the applicants had undergone, and had been detrimentally affected by, a 'dangerous' migratory journey. The difference between the two judgments, however, lies in whether the journey *alone* is sufficient to establish vulnerability under the ECHR. For the Chamber, the applicants' vulnerability had a single source, the journey, the danger of which was enough to

[155] *Khlaifia* (n 7) paras 135-136. By five votes to two.
[156] ibid para 135.
[157] ibid.
[158] ibid.
[159] ibid.
[160] *Khlaifia* [GC] (n 6) paras 199-200.
[161] ibid para 194.
[162] ibid para 249.
[163] ibid para 194.
[164] ibid paras 199-200. Unanimous.

render them vulnerable and to provide sufficient weight to in effect lower the minimum threshold needed to find a violation of article 3. Moreover, timing is crucial, as it cannot be assumed that such vulnerability is permanent. In the Chamber's view, the applicants were vulnerable at the material time, meaning that their detention, which was effective almost immediately upon their arrival on Lampedusa, occurred at a time when they were 'Convention vulnerable'.

The conceptualisation of vulnerability proffered by the Chamber was, without doubt, progressive, at least within the ECtHR's jurisprudence. For the majority in the Chamber, neither the legal status nor the political identity of the applicants was of issue when it came to the question of vulnerability. By taking this approach, the Chamber was able to release the *M.S.S.* two-pronged test from any restrictions that had been placed upon it as a consequence of it having been attached to the status of an asylum-seeker. Yet, the Grand Chamber, and indeed the minority in the Chamber,[165] elected to stick resolutely to a purely categorical application of the test. That the applicants failed to fall within any of the sub-population groups previously identified as vulnerable under the ECHR was fatal to their claim. Not only were the applicants not asylum-seekers,[166] they also 'belonged neither to the category of elderly persons nor to that of minors… did not claim to be suffering from any particular medical condition. Nor did they complain of any lack of medical care'.[167] In the words of Judge Raimondi, the applicants, who were aged in their mid-twenties,[168] were of 'young age and good health'.[169] The Grand Chamber thereby reverted to its most traditional, categorical approach, thus belying the nuance and conceptual sophistication that underpins the two-pronged *M.S.S.* test. While the Grand Chamber may have again reaffirmed the inherent and particular vulnerability of asylum-seekers, it has done so in a manner that unequivocally excludes non-asylum-seeking migrants from the Convention's 'special protection'.

At least for now, the Grand Chamber has squandered the opportunity to move towards a more nuanced, mutable conceptualisation of vulnerability that better responds to the lived experience of all those making the hazardous journey across the Mediterranean, whatever the

[165] *Khlaifia* (n 7) partly dissenting opinion of Judges Sajó and Vučinić, 53-58.
[166] *Khlaifia* [GC] (n 6) para 194.
[167] ibid.
[168] ibid.
[169] ibid, concurring opinion of Judge Raimondi, para 5. The words of Judge Raimondi are indeed most interesting given that he was on the side of the majority judgment in the Chamber.

reason or reasons for their journey. Yet, in addition to this, the Grand Chamber's *Khlaifia* judgment has also had an important impact on the scope of the *M.S.S.* test, an impact that seemingly narrows and thereby restricts the test in two particular, overlapping ways.

First, it appears to amend the second prong (prior trauma). As mentioned, both prongs of the *M.S.S.* test were left open to broad interpretation. Yet, while the express wording in *M.S.S.* was 'because of… the traumatic experiences he was likely to have endured *previously*',[170] in *Khlaifia*, the Court made explicit reference to the fact that the applicants 'did not claim to have endured traumatic experiences *in their country of origin*'.[171] While it can be argued that this requirement that the trauma be endured in the 'country of origin' was always implicit in the test, this being because the test was detailed in the express light of an asylum-seeking migrant, it is nevertheless the case that this qualification did not explicitly feature in the initial test. The effect of this 'clarification' is to narrow the possible interpretation of the second prong, framing it more unequivocally as a test that applies only to those seeking asylum.

Second, it hints towards an imbalance in the test. On the face of it, the Grand Chamber's *Khlaifia* judgment appears to lend further support to the *M.S.S.* vulnerability test as a two-pronged test. Both prongs were explicitly considered in the judgment, and while it was acknowledged that the applicants had undertaken a 'dangerous journey', the fact that they had 'not claim[ed] to have endured traumatic experiences'[172] was fatal to their claim. As such, and in accordance with the test being two-pronged, non-fulfilment of the second prong (prior trauma) meant that the test had not been met and the applicants were not 'particularly vulnerable' under the ECHR. However, what the *Khlaifia* Grand Chamber judgment also helps reveal is an apparent prioritisation of the second *M.S.S.* prong (prior trauma) over the first (migratory experience). As mentioned, in *M.S.S.*, the Grand Chamber tied the two-prong test to what it pronounced as the 'inherent' vulnerability of asylum-seekers. The Grand Chamber therefore effectively declared that all asylum-seekers automatically satisfy the two prongs, and that therefore all asylum-seekers are vulnerable as a result of the journey *and* as a result of prior traumatic experiences. Yet, to take each prong in turn, while the second (prior trauma) is indeed likely to be typical, albeit not unique, to the situation of asylum-seekers, the first (migratory experience) is by no means exclusive to those seeking asylum, as is made apparent by the facts

[170] *M.S.S.* (n 2) para 232.
[171] *Khlaifia* [GC] (n 6) para 194.
[172] ibid.

in *Khlaifia*. Additionally, by no means can it automatically be assumed that an individual who is seeking asylum has undergone a 'dangerous' journey in order to seek asylum – indeed, this does not form a pre-requisite for the recognition of refugee status. As such, although the applicant in *M.S.S.* did satisfy both prongs of the test, it seems perfectly plausible that a situation may arise in which an asylum-seeker may not necessarily meet the first prong of the test, that is vulnerability on account of the journey, but would nevertheless be recognised as vulnerable under the ECHR due to the Grand Chamber's position that all asylum-seekers are to be 'unconditionally'[173] recognised as such. Yet, conversely, as shown by *Khlaifia*, meeting the first prong (migratory journey) but not the second (prior trauma) fails to establish particular vulnerability. It could of course be argued that the first prong is simply so open-ended, per the use of the word 'everything', that it would always be met by all asylum-seekers regardless of the precise nature of their journey, remembering of course that the journey is only one aspect to be taken into consideration in this respect. Yet, even if this is the case, an imbalance would still occur because while the first prong (migratory journey) would be open to a broad interpretation, the second (prior trauma) would be so narrowly interpreted as to in effect restrict it to asylum-seekers only.

This imbalance, along with the clarification of the first prong, provides further evidence of the Court latching onto a traditional understanding of vulnerability. Despite the Grand Chamber itself having identified vulnerability in the Mediterranean migration context as two-pronged, the second, prior traumatic experience, now specifically in the country of origin, appears to be prioritised over the first, everything that is experienced during migration, including the journey.

In sum, the Grand Chamber's approach to vulnerability in the Mediterranean migration context is categorical par excellence. While the ECtHR may to some degree appreciate the universality of human vulnerability, while it does typically engage in an individualised assessment of an applicant's claims, and while it may, at least impliedly, recognise a diverse range of vulnerability's sources, including in its situational and pathogenic forms, the way in which the concept is applied by the Court in this particular context nevertheless relies on the attribution of vulnerability to an individual based upon their membership of a recognised vulnerable sub-population group. The consequence for the ECtHR is an unduly rigid,

[173] To use the word employed by Judge Sajó in his partly concurring and partly dissenting opinion to the Grand Chamber's judgment in *M.S.S.* See (n 2) 101.

essentialising conceptualisation of vulnerability that is ill-equipped to respond effectively to the reality of increased mixed-migratory flows arriving at the borders of Europe by sea. The consequence for non-asylum-seeking migrants who have crossed the Mediterranean into Europe is that while the physical and psychological toll of their journey is to be noted by the Court, their resulting vulnerability remains unrecognised.

Yet, there is one final and somewhat curious aspect to the Grand Chamber's unwillingness to recognise the vulnerability of non-asylum-seeking migrants crossing the Mediterranean. It is clear from surveying the Court's judgments post-*M.S.S.* that just because asylum-seekers are now recognised as particularly vulnerable by the Court does not mean that a violation of the Convention will automatically follow. This aligns with the position pre-*M.S.S* in respect to some other vulnerable groups, for instance, as in *Chapman* mentioned above.[174] For example, in *Mahamed Jama*, although the applicant was seeking asylum in Malta at the time, and so therefore automatically met the two-pronged *M.S.S.* test of 'particular vulnerability',[175] the Court found no violation of Article 3.[176] This was because, in its view, even having taken into consideration the applicant's particular vulnerability as an asylum-seeker, 'the cumulative effect of the conditions complained of… did not amount to degrading treatment'.[177] Moreover, and perhaps most intriguingly, the Court then went on to say that it '[did] not lose sight of the fact that the applicant… was not more vulnerable than any other adult asylum-seeker detained at the time'.[178] While the Court offered no further clarification at this point, more is revealed by looking to the subsequent case of *Abdullahi Elmi and Aweys Abubakar v Malta*.[179] As in *Mahamed Jama*, *Abdullahi Elmi* concerned irregular entry into Malta by boat.[180] Although there are numerous similarities between the two cases, there is, however, one crucial difference. While the applicant in *Mahamed Jama* was an adult,[181] the applicants in *Abdullah Elmi* were minors, aged sixteen and seventeen.[182] In *Abdullahi Elmi*, the Court reiterated the particular vulnerability of the applicants as asylum-seekers,[183] exactly as it had done in *Mahamed Jama*,

[174] *Chapman* (n 104).
[175] *Mahamed Jama* (n 136) para 100.
[176] ibid para 102.
[177] ibid para 100.
[178] ibid.
[179] *Abdullahi Elmi and Aweys Abubakar v Malta* Apps nos 25794/13 and 28151/13 (ECtHR, 22 November 2016).
[180] ibid paras 6 and 11.
[181] The applicant in *Mahamed Jama* had in fact falsely claimed to be a minor during her stay in Malta. See (n 136) paras 11, 13 and 99.
[182] ibid para 113.
[183] *Abdullahi Elmi* (n 179) para 113.

but then went on to emphasise that the applicants were indeed minors. In the view of the Court, the applicants 'were even more vulnerable than any other adult asylum-seeker detained at the time because of their age'.[184] It was at this point that *Mahamed Jama* was cited, *a contrario*.[185] This is most interesting given that it was actually in its judgment in *Mahamed Jama* that the Court stated that the particular vulnerability of asylum-seekers 'exists irrespective of… age factors'.[186] While it may indeed be the case that age does not impact the Court's recognition of asylum-seekers' particular vulnerability, it nonetheless appears that age was here pivotal to whether a violation was found.[187] The same also seems to have been the case in *Tarakhel v Switzerland*.[188] Although in this case the six minors, aged between 2 and 15,[189] were accompanied by their parents (the applicants), the Grand Chamber nevertheless affirmed their 'extreme vulnerability' as asylum-seeking children,[190] before then reaching the conclusion that there would be a related violation of article 3 should the family be returned to Italy without the necessary guarantees in place.[191]

It appears therefore that something more is needed to find a violation. Being one asylum-seeker amongst many is simply not enough. An applicant needs that certain something that, when combined with their 'inherent' and 'particular' vulnerability,[192] means they stand out from the 'asylum-seeking crowd'. Based on the post-*M.S.S.* case law, this certain something may very well be age, especially being a minor, although particularly poor living conditions may also suffice. Indeed, looking to *M.S.S.* itself, it was crucial that the applicant, who was not a minor, was residing in a state of the 'most extreme poverty'.[193] This is of course an exceedingly high bar to meet. It was to some degree nevertheless affirmed in *Tarakhel*, where although the ECtHR had 'serious doubts' about the capacity of the asylum reception system in Italy, it did not find the arrangements in Italy sufficiently deficient to 'act as a bar to all removals of asylum seekers to that country'.[194] What was though absolutely pivotal in *Tarakhel* was that the applicants had six children. It would therefore be reasonable to speculate that even

[184] ibid.
[185] *Mahamed Jama* (n 136) para 113.
[186] ibid para 100.
[187] ibid paras 113-115.
[188] *Tarakhel v Switzerland* [GC] App no 29217/12 (ECtHR, 4 November 2015).
[189] ibid para 1.
[190] ibid para 119.
[191] ibid para 122.
[192] *M.S.S.* (n 2) paras 233 and 251 respectively.
[193] ibid para 254.
[194] *Tarakhel* (n 188) para 115.

if the applicants in *Khlaifia* had been asylum-seekers, they would likely still not have been successful in their claim under article 3, on account of their age, the short duration of their detention, and the Grand Chamber's view that their detention conditions could be distinguished from the more severe conditions found in earlier cases. With the work of Beduschi and Timmer in mind, it seems therefore that for the ECtHR to find a violation in such cases requires some form of compounded vulnerability. Moreover, it appears that the compound must include the presence of at least one recognised vulnerable sub-population group, meaning that the Court is once again relying on a heavily traditional conceptualisation of vulnerability as categorical. While being an asylum-seeker would suffice for this purpose, when it comes to non-asylum-seeking migrants, specifically irregular migrants, it seems that only in situations of the most 'extreme' vulnerability involving children would the vulnerability of the applicant act as 'the decisive factor… tak[ing] precedence over considerations relating to… status as an illegal immigrant'.[195]

This finding that the recognition of particular vulnerability does not lead to an automatic violation of the Convention raises the broader question of why the Court has been so reluctant to accept the seemingly self-evident vulnerability of non-asylum-seeking migrants arriving at Europe's southern shores. To provide a satisfactory answer to this question would likely require further empirical exploration, but what is clear is that for the Court to approach the question of vulnerability through the lens of the now asylum-seeker-specific *M.S.S.* test would be to present non-asylum-seeking migrants with a *fait accompli*. The Court would not, as Peroni had hoped, be opening up the concept of vulnerability to embrace 'other circumstances and other groups',[196] but would instead be utilising the vulnerability concept as a tool for exclusion.

4. Conclusion – Behind the times or a sign of the times?

The ECtHR's judgments in the cases of *M.S.S.* and *Khlaifia* have proven to be of immense significance not only for the rights protections of asylum-seeking and non-asylum-seeking migrants risking their lives to cross the Mediterranean, but also for the development, or lack thereof, of the Court's understanding and use of the concept of vulnerability. While through these judgments the Court has engaged with differing conceptualisations of vulnerability, and

[195] *Mubilanzila Mayeka* (n 87) para 55; *Rahimi v Greece* App no 8687/08 (ECtHR, 5 April 2011) para 86.
[196] Peroni (n 128).

for a brief period appeared to be moving towards a more nuanced and dynamic form of situational vulnerability, the ECtHR has ultimately stuck steadfastly to the much-maligned traditional approach of attributing individual vulnerability on the basis of vulnerable sub-population group membership. For those migrants who have made the perilous journey across the Mediterranean, but 'who fall within the groups of undocumented migrants or rejected asylum-seekers rather than within the vulnerable group of asylum-seekers', the Court has now made clear its position that they are not to be considered vulnerable as a group.[197] It appears that only in the most extreme examples of compounded vulnerability will irregular migrants be recognised as vulnerable under the ECHR, and the likelihood is that those recognised as such will be minors. As has here been shown, such a position is lamentable. Rather than utilising the concept of vulnerability as a means by which to move towards a human rights law that is 'more inclusive… [and] more responsive to the needs of vulnerable people',[198] whatever their legal or political status, the concept has instead been used to further exclude those who are already some of the most marginalised by society and the law.

Looking to other fields, it seems that change is being embraced. Within the medical sciences, the latest edition of the CIOMS Guidelines, published in 2016,[199] exhibit a demonstrable semantic shift away from the traditional language of group-based vulnerability towards explicit recognition of individual vulnerability.[200] Although the Guidelines do not reflect a complete conceptual split from the traditional approach,[201] they do nonetheless emphasise 'the importance of avoiding classification of entire groups as inherently vulnerable'.[202] The UNHCR's 2016 Vulnerability Screening Tool[203] also takes a strikingly similar approach. While the Tool does mention many of those groups commonly considered to be vulnerable, it also recognises the vulnerability of those who do not fit within the established categories, stating that 'their individual circumstances and context are the main determinates of vulnerability'.[204] This is indeed in stark contrast to the 'mere affiliation' approach that

[197] In response here to Flegar who posed this very question in 2016. See (n 83) 157.
[198] Timmer (n 1) 122.
[199] CIOMS, *International Ethical Guidelines for Health-related Research Involving Humans* (4th edn, CIOMS 2016).
[200] ibid 57-58.
[201] ibid. Reference is still made in the Guidelines to 'members of groups that have traditionally been considered vulnerable'.
[202] ibid 59.
[203] UNHCR (n 131).
[204] ibid 2.

characterises categorical conceptualisations of vulnerability.[205] Moreover, the Tool warns against 'a rigid or exhaustive measurement of vulnerability',[206] advocating instead for 'a person-centred and holistic approach'.[207] Such change is, however, yet to be seen in the ECtHR, and the Grand Chamber's judgment in *Khlaifia* does very little to take any such steps towards this needed conceptual shift.

It would, of course, be unhelpful to downplay the challenges that southern European states face as a result of ongoing influxes of migrants at their borders. The Grand Chamber indeed recognised as much in its *Khlaifia* judgment when it stated that 'the undeniable difficulties and inconveniences endured by the applicants stemmed to a significant extent from the situation of extreme difficulty confronting the Italian authorities at the relevant time'.[208] But for the Convention to be able to respond effectively to new challenges, it must adapt and evolve in line with the changing global socio-political climate. Moreover, the Court must remain vigilant and must continue to re-assert, perhaps now more than ever, that the responsibility for protecting the most vulnerable, whomever they may be, rests with the contracting states.

[205] Brandl and Czech (n 131) 250.
[206] UNHCR (n 131) 3.
[207] ibid.
[208] *Khlaifia* [GC] (n 6) para 185. This position was then soon after relied upon in the Court's judgment in the case of *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 14 March 2017) para 83. *Ilias* also concerned the entry of asylum-seekers into Europe, albeit via the Western Balkan route.